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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

NETCHOICE, LLC, **Plaintiff,** **v.** **SEAN D. REYES, in his official capacity as Attorney General of Utah,** **KATHERINE HASS, in her official capacity as Director of the Division of Consumer Protection of the Utah Department of Commerce,** **Defendants.**	**PLAINTIFF'S SUPPLEMENTAL BRIEF ON THE SUPREME COURT'S *MOODY* DECISION** **Case No. 2:23-cv-00911-RJS-CMR** **Judge Robert J. Shelby** **Magistrate Judge Cecilia M. Romero**

Moody v. NetChoice, LLC confirms that "the First Amendment . . . does not go on leave when social media are involved." 144 S. Ct. 2383, 2394 (2024). That case reaffirms that NetChoice's facial challenge is proper and should prevail. NetChoice submits this supplemental brief to address the Court's two questions: (1) "What effect, if any, does the *Moody* decision have on the facial challenges presented in Plaintiff's Amended Complaint?"; (2) "What, if any, is the 'plainly legitimate sweep' of the Utah Minor Protection in Social Media Act?" ECF 71 at 2.

On the first question, *Moody* validates that the parties have already litigated according to the long-standing facial challenge standard for First Amendment cases. On the second question, the Act lacks any "plainly legitimate sweep." *Moody*, 144 S. Ct. at 2397 (citation omitted).

I. Question 1: What effect, if any, does the *Moody* decision have on the facial challenges presented in Plaintiff's Amended Complaint?

Moody did not alter the First Amendment inquiry here. Rather, it reiterated the same standard that NetChoice has argued applies in this case: "whether 'a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* (cleaned up) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) ("*AFP*")). Under that well-established standard, the parties in this case have "assess[ed] the state [law's] scope." *Id.* at 2398. The Act singles out "[s]ocial media compan[ies]" operating "social media service[s]." § 13-71-101(13). The Act does so through a content-, speaker, and viewpoint-based coverage definition, targeting websites that "allow users to interact socially" and publicly "post content" generated by users. § 13-71-101(14)(a)(iii), (v). Furthermore, none of the potential issues that *Moody* identified in that case are applicable here. In fact, *Moody*'s reasoning only confirms that Plaintiff should prevail on the merits. The Act and its provisions are therefore facially invalid.

A. *Moody* did not change the standard for First Amendment facial challenges.

In facial challenges under the First Amendment (including vagueness challenges), "[t]he question is whether 'a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Moody*, 144 S. Ct. at 2397 (cleaned up) (quoting *AFP*, 594 U.S. at 615). Under this standard, "even a law with 'a plainly legitimate sweep' may be struck down in its entirety . . . if the law's unconstitutional applications substantially outweigh its constitutional ones." *Id.* (citation omitted). This is the same standard that NetChoice invoked in its First Amended Complaint and Motion for Preliminary Injunction. ECF 51 ¶ 69 (citing *AFP*, 594 U.S. at 615); ECF 52 at 15 (citing *United States v. Stevens*, 559 U.S. 460, 472-73 (2010)).

Moody did not change this standard. 144 S. Ct. at 2397. To the contrary, it reiterated that this "lowered . . . bar" sets a "less demanding though still rigorous standard" in the "singular" First Amendment context. *Id.* Outside of the First Amendment (and vagueness claims involving speech), facial challenges require a demonstration that "no set of circumstances exists under which the law would be valid." *AFP*, 594 U.S. at 615 (cleaned up). The "different standard" for claims involving speech is necessary "[t]o 'provide breathing room for free expression.'" *Moody*, 144 S. Ct. at 2397 (cleaned up) (quoting *United States v. Hansen*, 599 U.S. 762, 769 (2023)).

B. The parties' arguments already address the standard reaffirmed in *Moody*.

The parties' arguments address *Moody*'s framework for determining whether "a substantial number of [the Act's] applications are unconstitutional." *Id.* (citation omitted).

1. Here, NetChoice and Defendants "assess[ed] the state [law's] scope." *Id.* at 2398. Both identified which websites are regulated by the Act and what obligations the Act imposes. In short, the Act restricts minors' and adults' access to covered "social media" websites, and it further limits

their ability to speak and listen on those websites. So, there are no unanswered questions or disputes about "[w]hat activities, by what actors, [the Act] prohibit[s] or otherwise regulate[s]." *Id.* Defendants themselves have asserted the Act's regulatory scope is clear. *E.g.*, ECF 58 at 7, 28. Unsurprisingly, therefore, Defendants have not asserted that there are questions about the Act's regulatory scope that would alter the First Amendment analysis. Instead, Defendants have erroneously argued that the Act imposes uniformly constitutional burdens on social media websites.

Regulated "actors." The Act regulates "social media" websites defined by their dissemination and facilitation of users' speech. As Defendants repeatedly state, the Act "target[s] . . . social media" websites. *Id.* at 28 ("The State's targeting of social media . . ."). And as they say, the Act regulates "platforms where interactive, immersive, social interaction is the whole point." *Id.* at 25; *id.* at 23 (the Act regulates websites that allow "users to interact *with each other*").

NetChoice, likewise, has explained the Act's scope. It has identified which of its members have services regulated by the Act. *See* ECF 51 ¶ 11; ECF 52 at 5; ECF 52-1 ¶ 11. It has likewise identified the full range of websites the Act regulates. *See* ECF 52 at 17 ("[T]he Act onerously regulates websites that facilitate the protected speech of their users."); ECF 52-1 ¶ 12 ("countless websites, message boards, and community forums that are a home for discussion on every topic under the sun—everything from politics and religion to classical music, backpacking, homeschooling, board games, gardening, and hundreds of other subjects"). *Moody* applied full First Amendment protection to websites that work in exactly this way—that "allow users to upload content . . . to share with others" and allow those "viewing the content . . . to react to it, comment on it, or share it themselves." 144 S. Ct. at 2394-95.

True, there are distinctions among covered websites. But those are distinctions without any

difference for purposes of how the First Amendment applies to the websites under *Moody*. All websites covered by the Act are "expressive products" that "receive the First Amendment's protection." *Id.* at 2393. If anything, the Act's distinctions illustrate it is poorly tailored. *See, e.g.*, ECF 73 at 12. For example, the fact that Dreamwidth does not use seamless pagination (which the Act prohibits on minors' accounts) does not render the Act's other onerous requirements constitutional as applied to Dreamwidth. *See* ECF 52-5 ¶ 13. Rather, it means that the Act is overinclusive in the websites it regulates—according to Defendants' stated justifications. *See* ECF 52 at 24.

Regulated "activities." The parties also clearly identified the Act's range of regulated "activities." *Moody*, 144 S. Ct. at 2398. The Act (1) requires parental consent before minors can speak beyond state-limited networks, §§ 13-71-202(1)(a)-(b), 13-71-204(1); (2) prohibits autoplay, seamless pagination, and certain notifications on minors' accounts, § 13-71-202(5); and (3) requires websites to do "age assurance" before permitting anyone to access and engage in speech, § 13-71-201.

Defendants call these "precise" obligations and address how each of them apply in their Opposition. ECF 58 at 7, 60; *see id.* at 18-19, 30-42. Defendants have argued that these specific requirements are necessary to address the purported harms that Defendants contend *uniquely* arise from the "social media" websites the Act regulates. *E.g.*, *id.* at 25-30. In other words, Defendants' justifications for, and legal arguments about, the Act's operative provisions specifically address "social media" websites.

2. The parties have also argued about "which of the [Act's] applications violate the First Amendment," and have "measure[d] them against the rest." *Moody*, 144 S. Ct. at 2398. Of course, the parties disagree on the *merits* about whether the Act violates the First Amendment. But that

disagreement is not about how the First Amendment applies to *different* websites or regulatory requirements. The parties instead disagree about whether the Act's requirements are uniformly unconstitutional across all covered social media websites.

For example, NetChoice argued that the "entire Act triggers" and fails "strict scrutiny." ECF 52 at 16; *see id.* at 16-24; ECF 73 at 2-5. That is because the Act's scope- and compliance-defining term—"social media company," § 13-71-101(13)—restricts and burdens protected speech based on content, speaker, and viewpoint. That renders the Act facially invalid. NetChoice further argued that individual provisions of the Act are facially unconstitutional.

First, the "Act's limitations on the ways that minors can engage in their own protected expression—and that covered websites can disseminate such expression—absent parental consent violate the First Amendment." ECF 52 at 26-27 (addressing §§ 13-71-202(1)(a)-(b), 13-71-204(1)); *see id.* at 26-30; ECF 73 at 14-17. Any time governments require minors to secure parental consent before minors can access and engage in their own speech, that is presumptively unconstitutional. *E.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 795 n.3 (2011). So whenever the Act's parental-consent requirement applies, it unconstitutionally restricts minors' ability to speak. *See City of L.A. v. Patel*, 576 U.S. 409, 418 (2015) (facial challenges "consider[] only applications of the statute in which it actually authorizes or prohibits conduct"). There is no question about whether this parental-consent requirement applies differently to different social media websites. Instead, Defendants categorically argue that "children [do not] have a constitutional right to interact with strangers online." ECF 58 at 29.

Next, the "Act violates the First Amendment by prohibiting specific means of disseminating speech on minors' accounts," ECF 52 at 30—through prohibitions on autoplay, seamless

pagination, and some notifications, § 13-71-202(5); *see* ECF 52 at 30-32; ECF 73 at 17-21. When governments restrict private publishers' right to "make choices about what third-party speech to display *and how to display it*" on "expressive" services, that is presumptively unconstitutional. *Moody*, 144 S. Ct. at 2393 (emphasis added). Thus, any time the Act restricts a website's ability to choose how to disseminate protected speech, it is invalid. *Patel*, 576 U.S. at 418. Here too, there is no question about whether the First Amendment inquiry varies among covered websites. To the contrary, Defendants argue that these prohibitions are justified by their application to "social media" websites, which Defendants contend raise unique concerns. *E.g.*, ECF 58 at 28.

Finally, "the Act violates the First Amendment by requiring covered websites to engage in 'age assurance'"—for both adult and minor users—"to disseminate protected and valuable speech." ECF 52 at 32 (addressing § 13-71-201); *see id.* at 32-34; ECF 73 at 21-24. It is presumptively unconstitutional for governments to restrict access to protected speech. *See FEC v. Cruz*, 596 U.S. 289, 305 (2022) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." (citation omitted)). That is especially true here, because the Supreme Court has held that governmental restrictions on accessing "social media" and similar websites "prevent the user from engaging in the legitimate exercise of First Amendment rights" and trigger heightened First Amendment scrutiny. *Packingham v. North Carolina*, 582 U.S. 98, 108 (2017). Thus, whenever the age-assurance requirement applies to restrict such access, it is unconstitutional. *See Patel*, 576 U.S. at 418. Under First Amendment doctrine, there is no uncertainty about whether these principles apply differently to different covered websites. Instead, Defendants say that the Act's requirement is constitutional because "children are different." ECF 58 at 37.

C. The potential issues identified in *Moody* are inapplicable here.

This case does not implicate distinct laws potentially regulating other activities and actors beyond social media websites, which might possibly require a different First Amendment analysis if governments compelled those distinct actors to disseminate speech.

As an initial matter, this Act "restricts" *access* to protected speech, which is presumptively unconstitutional. *E.g.*, *FEC v. Cruz*, 596 U.S. at 305. That is true even for laws restricting speech via individual-to-individual communication. *E.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126-31 (1989). In contrast, *Moody* considered governmental attempts to *compel* speech dissemination; and *Moody* did not address how compelled-speech principles might operate where a website might not be an "expressive product" (such as a "ride-sharing service"). 144 S. Ct. at 2398.

In all events, unlike *Moody*, there is no question whether the Act extends beyond expressive services that publicly disseminate and enable users' protected speech to *other* services such as "online marketplace[s] like Etsy" or "ride-sharing service[s] like Uber." *Id.*[1] Indeed, Defendants steadfastly assert the Act reaches only "social media," using that phrase 240 times in their 60-page opposition brief. ECF 58; *see supra* p.3. NetChoice too has emphasized that the Act regulates expressive websites where users go to engage in protected speech. *Supra* p.3; *see NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *16 (W.D. Ark. Aug. 31, 2023) ("the primary purpose of a social media platform is to engage in speech"). And on these websites, the Act imposes threshold burdens for all users to engage in speech (through age assurance), further restricts minors' ability to speak

[1] The Act also expressly excludes "email." § 13-71-101(14)(b)(i). Nor would it matter if the Act's speech restrictions extended to "direct messaging service[s]." *Moody*, 144 S. Ct. at 2398. Imposing the Act's speech restrictions on those services would create even more of the same types of First Amendment problems that arise when governments restrict speech. *E.g.*, *Sable*, 492 U.S. at 126-31 (finding unconstitutional a law restricting individual-to-individual telephone messages).

(through parental consent), and limits the ways that websites can disseminate speech (through prohibitions on autoplay, seamless pagination, and certain notifications).

D. NetChoice's vagueness arguments do not frustrate the facial challenge.

Governments cannot impose vague regulations and then leverage that vagueness to hinder First Amendment challenges. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.6 (1982) ("the vagueness of a law affects overbreadth analysis"). At a minimum, that would require the Court to enjoin the Act as vague. *See* ECF 52 at 24-25, 30-32, 37-39; ECF 73 at 26-30. Regardless, the Act both is unconstitutionally vague *and* violates the First Amendment.

Specifically, the vagueness issues that NetChoice has raised go to *how much* protected speech the Act reaches—not *whether* the Act reaches protected speech. For example, the Act's central coverage definition is vague because it is not clear what it means to "allow users to interact socially." § 13-71-101(14)(a)(iii); *see* ECF 52 at 25. Similarly, it is not clear how much user-generated speech covered websites must disseminate (whether a "majority, supermajority, or some other measure," ECF 52 at 25), through the Act's requirement that websites "primarily" "display[]" content "generated by account holders," § 13-71-101(14)(a)(i).

NetChoice's other vagueness arguments are similar. The Act does not explain, for example, how covered websites are supposed to comply with the Act's ban on seamless pagination and certain notifications on minors accounts. *See* ECF 52 at 30-32. Those prohibitions are unconstitutional regardless of their scope. *Id.* And the Act's data-collection and data-usage restrictions likewise provide covered websites with no guidance about compliance. *See id.* at 37-39.

II. Question 2: What, if any, is the "plainly legitimate sweep" of the Utah Minor Protection in Social Media Act?

The Act and its prohibitions lack any "plainly legitimate sweep." *Moody*, 144 S. Ct. at 2397

(citation omitted); *see NetChoice, LLC v. Fitch*, 2024 WL 3276409, at *14 (S.D. Miss. July 1, 2024) (concluding similar law failed First Amendment strict scrutiny). *Moody* explained that courts need to "explore the [law's] full range of applications—the constitutionally impermissible and permissible both—and compare the two sets." 144 S. Ct. at 2398. Here there is no constitutionally permissible application of the law: The entire Act is facially invalid because it is a content-, speaker-, and viewpoint-based regulation of protected speech that fails strict scrutiny. Unlike *Moody*, which dealt with compelled speech, here the Act seeks to regulate access to protected speech on social media websites. There is no legitimate sweep of such a law.

Undisputedly, "social media platforms contain vast amounts of constitutionally protected speech for both adults and minors," substantially outweighing any amount of unprotected speech. *Griffin*, 2023 WL 5660155, at *16. There may be some covered websites with a small amount of unprotected speech. But the First Amendment's unique facial-challenge standard and heightened First Amendment scrutiny account for this potential that laws may reach some unprotected speech. And they require governments to tailor their laws to address concerns about unprotected speech. In the First Amendment context (including vague laws affecting speech), governments cannot regulate broadly and then identify isolated examples of unprotected speech to defeat facial challenges. *See Moody*, 144 S. Ct. at 2397. Defendants have never asserted the Act is aimed at, or justified by, the regulation of *unprotected* speech. They have "acknowledge[d] that social media platforms contain speech, such that there are First Amendment and Due Process concerns" triggering heightened First Amendment scrutiny. ECF 58 at 10. Even if there were some potentially constitutional applications of the Act, those are few and far between and warrant little weight in the analysis.

A similar analysis holds for the Act's individually challenged provisions. Blanketly

limiting the people to whom minors can speak without parental consent has no legitimate sweep. §§ 13-71-202(1)(a)-(b), 13-71-204(1). Virtually all, if not all, such speech is wholly protected. Even if Defendants offer a hypothetical of a minor using her speech rights to engage in unprotected speech, that is still no justification for rejecting a facial challenge to a parental-consent restriction for engaging in all sorts of protected speech. Nor have Defendants offered this as any justification for the Act's parental-consent requirement. Similarly, blanketly restricting how covered websites can disseminate protected speech to minors (§ 13-71-202(5)) has no legitimate sweep, as it would unconstitutionally dictate "how to display" "third-party speech." *Moody*, 144 S. Ct. at 2393.

Finally, the age-assurance requirement lacks a legitimate sweep. § 13-71-201. The Supreme Court and lower courts have concluded that even restricting minors' access to speech unprotected for minors (like pornography) cannot justify age-verification requirements. *See Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004); *Reno v. ACLU*, 521 U.S. 844, 882 (1997); *Sable*, 492 U.S. at 126-31; *ACLU v. Mukasey*, 534 F.3d 181, 192-93 (3rd Cir. 2008); *PSInet v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999); *Free Speech Coal., Inc. v. Rokita*, 2024 WL 3228197, at *8 (S.D. Ind. June 28, 2024).[2] So the Act's age-assurance requirement, restricting access to wholly protected speech, is surely facially invalid.

Conclusion

Plaintiff requests that this Court grant Plaintiff's Motion for Preliminary Injunction.

[2] Utah has a separate law imposing age-verification to access websites that contain a "substantial portion" of obscenity for minors. § 78B-3-1002(1). Enjoining this Act's requirement, therefore, will not frustrate the State's interest in restricting access to websites with a substantial portion of speech qualifying as obscenity for minors. And that distinct law is a less-restrictive alternative.

RESPECTFULLY SUBMITTED this 17th day of July.

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Certificate of Service

I, Jeremy Evan Maltz, certify that on July 17, 2024, the foregoing was filed electronically via the Court's CM/ECF system.

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